

STATE OF SOUTH CAROLINA

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In the Matter of

COVER SHEET

Application of Duke Energy Carolinas, LLC for
Approval of Decision to Incur
Nuclear Generation Pre-Construction Costs

DOCKET
NUMBER: 2007-440-E

(Please type or print)

Submitted by: Frank R. Ellerbe, III

SC Bar Number: 1866

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DOCKETING INFORMATION (Check all that apply)

- ☐ Emergency Relief demanded in petition ☐ Request for item to be placed on Commission's Agenda expeditiously
- ☐ Other: _____

INDUSTRY (Check one)	NATURE OF ACTION (Check all that apply)		
<input checked="" type="checkbox"/> Electric	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Letter	<input type="checkbox"/> Request
<input type="checkbox"/> Electric/Gas	<input type="checkbox"/> Agreement	<input type="checkbox"/> Memorandum	<input type="checkbox"/> Request for Certificatio
<input type="checkbox"/> Electric/Telecommunications	<input type="checkbox"/> Answer	<input checked="" type="checkbox"/> Motion	<input type="checkbox"/> Request for Investigator
<input type="checkbox"/> Electric/Water	<input type="checkbox"/> Appellate Review	<input type="checkbox"/> Objection	<input type="checkbox"/> Resale Agreement
<input type="checkbox"/> Electric/Water/Telecom.	<input type="checkbox"/> Application	<input type="checkbox"/> Petition	<input type="checkbox"/> Resale Amendment
<input type="checkbox"/> Electric/Water/Sewer	<input type="checkbox"/> Brief	<input type="checkbox"/> Petition for Reconsideration	<input type="checkbox"/> Reservation Letter
<input type="checkbox"/> Gas	<input type="checkbox"/> Certificate	<input type="checkbox"/> Petition for Rulemaking	<input type="checkbox"/> Response
<input type="checkbox"/> Railroad	<input type="checkbox"/> Comments	<input type="checkbox"/> Petition for Rule to Show Cause	<input type="checkbox"/> Response to Discovery
<input type="checkbox"/> Sewer	<input type="checkbox"/> Complaint	<input type="checkbox"/> Petition to Intervene	<input type="checkbox"/> Return to Petition
<input type="checkbox"/> Telecommunications	<input type="checkbox"/> Consent Order	<input type="checkbox"/> Petition to Intervene Out of Time	<input type="checkbox"/> Stipulation
<input type="checkbox"/> Transportation	<input type="checkbox"/> Discovery	<input type="checkbox"/> Prefiled Testimony	<input type="checkbox"/> Subpoena
<input type="checkbox"/> Water	<input type="checkbox"/> Exhibit	<input type="checkbox"/> Promotion	<input type="checkbox"/> Tariff
<input type="checkbox"/> Water/Sewer	<input type="checkbox"/> Expedited Consideration	<input type="checkbox"/> Proposed Order	<input type="checkbox"/> Other:
<input type="checkbox"/> Administrative Matter	<input type="checkbox"/> Interconnection Agreement	<input type="checkbox"/> Protest	
<input type="checkbox"/> Other:	<input type="checkbox"/> Interconnection Amendment	<input type="checkbox"/> Publisher's Affidavit	
	<input type="checkbox"/> Late-Filed Exhibit	<input type="checkbox"/> Report	

**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2007-440-E**

In Re:)	
)	
Application of Duke Energy Carolinas, LLC)	
For Approval of Decision to Incur Nuclear)	MOTION FOR PROTECTIVE
Generation Pre-Construction Costs)	ORDER
)	
)	

Duke Energy Carolinas, LLC, ("Duke Energy Carolinas" or the "Company") hereby moves the Public Service Commission of South Carolina ("Commission") pursuant to 26 S.C. Regs. 103-829, and all other applicable rules, statutes and regulations of the Commission for a Protective Order in the above-captioned proceeding. By this Motion, Duke Energy Carolinas seeks protective treatment of certain commercially-sensitive, proprietary information described in the Company's Responses to FOE's First Discovery Requests. In support of the motion, Duke Energy Carolinas provides the following:

1. Friends of the Earth ("FoE") filed Interrogatories and Requests for Production dated March 13, 2008, with the Commission requesting that Duke Energy Carolinas produce certain cost data and related information regarding the William States Lee, III Nuclear Station ("Lee Nuclear Station"). These requests give rise to several issues regarding confidentiality which have caused the Company to file this motion. There are two categories of documents covered by this motion: (1) documents which are confidential but which Duke Energy Carolinas is willing to produce to counsel for FoE under a confidentiality agreement; and (2) documents which are confidential but

which Duke Energy Carolinas has been instructed to not produce by third parties as discussed in paragraph 2 below.

2. Certain of the documents covered by the discovery requests were also covered by confidentiality arrangements with third parties which required that Duke Energy Carolinas give those third parties notice of the discovery requests. That notice was given and the third parties have notified Duke Energy Carolinas that they object to certain documents being produced. Specifically, a consortium of potential suppliers led by Westinghouse Electric Company and Stone & Webster has notified the Company that it objects to the production of two documents which are designated Price Book and Transmittal Letter. See Exhibit 1, letter dated April 5, 2008 from Westinghouse and Stone & Webster. It is the understanding of counsel for the Company that this group has retained South Carolina counsel who will be making a special appearance in this proceeding to object to the production of these documents.

In addition, Duke Energy Carolinas has been notified by counsel for the Southern Company that it objects to the production of the Withdrawal Agreement which is covered by one of the discovery requests of the FoE.

3. As to the first category of confidential documents which Duke Energy Carolinas has offered to produce immediately upon the execution of a confidentiality agreement, counsel for the Company has consulted with counsel for FoE. There is a disagreement that has not been resolved as to the confidentiality of the documents and FoE is unwilling to accept any documents under a confidentiality agreement. Accordingly, Duke Energy Carolinas is seeking a protective order from this Commission maintaining the confidentiality of these documents for the purposes of this proceeding.

The public disclosure of such information would disadvantage the Company in negotiations for the procurement of major equipment to be installed in the Lee Nuclear Station since it would allow equipment suppliers to deduce the Company's own projections of anticipated equipment costs. See Exhibit 2, Affidavit of Dhiaa M. Jamil. Such disclosure would hamper Duke Energy Carolinas' ability to negotiate the lowest cost for its customers.

4. Duke Energy Carolinas is currently engaged in negotiations with a consortium known as Westinghouse Electric Corporation/Shaw Stone and Webster ("Westinghouse/Shaw") for a contract for the engineering, procurement and construction of the Lee Nuclear Station. The cost estimates the Company produced under the protection of the parties' Confidentiality Agreement are preliminary and are being developed in conjunction with Westinghouse/Shaw in the course of those negotiations. If complete estimates are disclosed to the public at large at this stage of the project, Duke Energy Carolinas will be placed at an unfair disadvantage in negotiations with potential suppliers of other project components (e.g., the turbines, reactors, etc.) since those suppliers may well be able to use the project estimates to deduce the Company's estimates regarding the price of their equipment. See Exhibit 1, ¶¶ 3-5. As Mr. Jamil indicates in his Affidavit, "If these suppliers have knowledge of the Company's estimated costs, then any bargaining position would be lost—all to the detriment of the Company's customers." Exhibit 1, ¶ 5. Thus, disclosure of interim cost estimates are unwarranted and could harm the Company's ability to negotiate the lowest cost for its customers.

5. The Commission has authority to issue a protective order in accordance with the South Carolina Rules of Civil Procedure. "The S.C. Rules of Civil Procedure govern all discovery matters not covered in Commission Regulations." 26 S.C. Reg. 103-835. Since nothing in the Commission's regulations on discovery (26 S.C. Regs. 103-832 to 103-834) covers motions for protective orders, S.C.R.Civ. P. 26(c) controls.

Upon motion by a party or by the person from whom discovery is sought, and for good cause show, the court in which the action is pending...may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden by expense, including one of the following: (1) that the discovery not be had...(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way....

S.C.R.Civ. P. 26(c).

6. The cost information which Duke Energy Carolinas seeks to protect meets the definition of a "trade secret" pursuant to the S.C. Trade Secrets Act. A "trade secret" is defined to include

Information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S.C. Code § 39-8-20(5). The Lee Nuclear Station cost data and related documents are clearly a compilation of information that has actual or potential commercial value. See Exhibit 1.

7. In any civil action where discovery is sought of information designated as a "trade secret," the Court must first determine whether there is a substantial need by the party seeking discovery. S.C. Code § 39-8-60(B) (Supp. 2007). The information sought is not relevant to the application and FoE will not be substantially prejudiced if there is no public disclosure of the information. In this proceeding, the Company seeks only the Commission's acknowledgement that it is prudent to continue to incur development costs and preserve the nuclear generation option.

8. Duke Energy Carolinas has offered to provide to legal counsel for FoE certain cost data and related information pursuant to a Confidentiality Agreement. Therefore, if he chooses to FoE's counsel would be free to use the information—consistent with the provisions of the Confidentiality Agreement—in responding to Duke Energy Carolinas' application in this docket.

9. The S.C. Freedom of Information Act ("FOIA") also allows exemption from disclosure for proprietary business information that meets a definition of "trade secrets." S.C. Code § 40-4-40(a)(1) states that matters may be exempt from FOIA include: "(1) Trade secrets, which are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes... Trade secrets also include, for those public bodies who market services or products in competition with others, feasibility, planning, and marketing studies...and evaluations and other materials which contain references to potential customers, competitive information, or evaluation."

10. The Supreme Court has upheld the Commission's issuance of a protective order in a similar case involving the disclosure of contracts during a semi-annual review of fuel purchasing practices of South Carolina Electric & Gas Co., Inc. ("SCE&G").

Hamm v. S.C. Public Service Com'n, 312 S.C. 238, 439 S.E.2d 852 (Sup. Ct. 1994).

The Consumer Advocate requested the production of SCE&G's coal purchasing contracts and coal transportation contracts. SCE&G objected to the production on the ground that publication of the contracts would impair its negotiating position in the future with coal vendors and transportation service providers. SCE&G's motion for a protective order did not seek to prevent the Consumer Advocate from viewing the contracts pursuant to a confidentiality agreement. It only sought to prevent the documents from becoming public. The Commission granted the motion and the Court upheld the ruling *Hamm v. PSC*, 439 S.E.2d at 853-854.

When the discovery process threatens to become abusive or to create a particularized harm to a litigant or third party, the Rules allow the trial judge broad latitude in limiting the scope of discovery....[T]he Commission's decision fully protected the Consumer Advocate's rights to secure access to relevant information in discovery, to seek broader disclosure of information and present admissible evidence in the Commission's hearing. Those decisions likewise protected the bargaining power of SCE&G in its fuel supply and transportation negotiations....We, like the circuit court, find no abuse of discretion in the Commission ordering the least restrictive means of protecting the interests of both parties.

Id. at 854. Likewise, premature release of the cost estimates being developed by the Company would also place Duke Energy Carolinas at a disadvantage in negotiating with equipment and other suppliers for the procurement of major components of the Lee Nuclear Station.

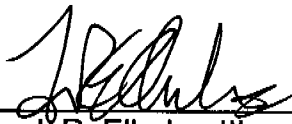
CONCLUSION

The issuance of a protective order concerning the public disclosure of confidential cost information would protect Duke Energy Carolinas' bargaining power

enabling the Company to negotiate the lowest possible cost for its customers. FoE will not in any way be prejudiced by maintaining the confidentiality of the information, and the Commission will not be hampered in its decision making by holding the information in confidence. We respectfully request that the Commission grant the motion for a Protective Order.

Dated this 7th day of April, 2008.

ROBINSON, MCFADDEN & MOORE, P.C.



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Counsel for Duke Energy Carolinas, LLC

EXHIBIT 1



S. Walt Coleman
Associate General Counsel
Duke Energy Corporation
EC03T / P.O. Box 1006
Charlotte, NC 28201

Westinghouse Electric Company
Nuclear Power Plants
4350 Northern Pike
Monroeville, PA 15146

Telephone (412) 374-4450
Fax (412) 374-6122
Email ackermils@westinghouse.com

Our Reference LD2185LSA

April 5, 2008

Via E-Mail and First Class Mail

Re: *Requests for Production of Documents to Duke Energy Carolinas, LLC
(DE Carolinas) from 'Friends of the Earth'*

Dear Walt:

We are responding to your letter dated March 25, 2008, notifying Westinghouse Electric Company, LLC ("Westinghouse") and Stone & Webster, Inc. ("S&W") of the receipt by DE Carolinas of a request for the production of documents from "Friends of the Earth," an organization that has intervened as a party to a regulatory proceeding before the Public Service Commission of South Carolina ("Commission") in Docket No. 2007-440-E. In that proceeding, DE Carolinas is requesting approval from the Commission to incur certain nuclear generation pre-construction costs. Friends of the Earth has requested from DE Carolinas documents related to the estimated costs of "the Westinghouse AP1000 power reactor to be constructed." Your letter states that DE Carolinas' regulatory attorneys believe that certain documents in the possession of DE Carolinas must be produced. Specifically, DE Carolinas believes it must produce (a) the AP1000 Price Book for the W.S. Lee III Units #1 & #2 dated December 17, 2007 (the "Price Book") and (b) the Price Book transmittal letter from Daniel Lipman and David Barry to Brew Barron dated December 14, 2007 (the "Transmittal Letter").

Westinghouse and S&W strongly disagree that the Price Book and Transmittal Letter are properly subject to disclosure in this proceeding. The information stated in the Price Book and Transmittal Letter is the proprietary property of Westinghouse and S&W, and was provided to DE Carolinas pursuant to the Confidentiality Agreement.

The Price Book and Transmittal Letter are not relevant to the subject matter of this proceeding, which is a proceeding to approve the decision of DE Carolinas to incur nuclear generation pre-construction costs. Construction costs are not at issue at this time

in this proceeding. Furthermore, while the total projected preconstruction costs to be incurred by DE Carolinas is relevant, the cost estimates provided by Westinghouse and S&W to DE Carolinas for that portion of the project that may be completed by Westinghouse and S&W is not. Westinghouse and S&W have not yet contracted with DE Carolinas for the construction of a plant. Therefore, the Price Book represents a proposal, and the prices set forth therein are estimates and are subject to change.

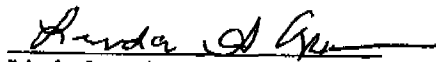
Further, the Price Book and Transmittal Letter are protected by the South Carolina Trade Secrets Act (S.C. Code. Ann. 39-8-10 et seq.). Certainly, you would agree that the Price Book and Transmittal Letter contain information that is not generally known and is not readily ascertainable from other proper sources, has great economic value to Westinghouse and S&W and has been kept secret by Westinghouse and S&W. Your letter dated March 25, 2008, confirms your belief that you consider this information confidential since it was this very confidentiality agreement (Confidentiality Agreement among DE Carolinas, Westinghouse, and S&W, dated December 10, 2007) that led you to notify Westinghouse and S&W of your intention to produce the information. The very purpose of the confidentiality agreement was to keep certain information, such as the Price Book and Transmittal Letter, confidential and protected from disclosure.

Disclosure of this information will severely harm Westinghouse and S&W. With this information improperly in the hand of competitors of Westinghouse and S&W or other potential AP1000 customers, our negotiations and development of the Lee Nuclear Station and other potential AP1000 nuclear power plant projects would be undermined.

In order to protect the Price Book and Transmittal Letter from disclosure, we will take the following actions immediately: (1) file a notice of appearance in Docket No. 2007-440-E for the limited purpose of protecting confidential information of Westinghouse and S&W from disclosure; and (2) file a motion for a protective order, along with a draft protective order, in Docket No. 2007-440-E, covering the Price Book and Transmittal Letter.

Pursuant to DE Carolinas' obligation under the Confidentiality Agreement to reasonably cooperate with Westinghouse and S&W to obtain an appropriate protective order or other remedy, we ask that DE Carolinas: (1) not disclose or produce the Price Book or Transmittal Letter, to Friends of the Earth or any other person or entity, unless and until the Commission issues an order directing these materials to be produced in Docket No. 2007-440-E; and (2) take appropriate and reasonable actions to support motion of Westinghouse and S&W for a protective order covering these materials in Docket No. 2007-440-E.

Sincerely,


Linda S. Ackerman
Assistant General Counsel
Westinghouse Electric Company LLC

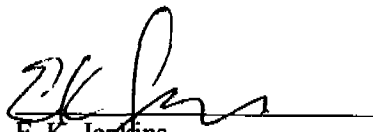

E. K. Jenkins
E&C Division Counsel
Stone & Webster, Inc.

EXHIBIT 2

**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2007-440-E**

In Re:)	
)	
Application of Duke Energy Carolinas, LLC)	
for Approval of Decision to Incur)	Affidavit of Dhiaa M. Jamil
Nuclear Generation Pre-Construction Costs)	
)	
)	

DHIAA M. JAMIL, being duly sworn, deposes and says:

1. I am the Group Executive and Chief Nuclear Officer for Duke Energy Carolinas, LLC (the "Company"), am over the age of 21, and make this affidavit upon my own personal knowledge.

2. The Company is currently in the process of continuing the preconstruction development work for a new nuclear generation facility known as the William States Lee III Nuclear Station (the "Lee Nuclear Station"). Within the Company, I have ultimate responsibility for the safe and reliable operation of the Company's nuclear generation fleet, including the proposed Lee Nuclear Station that is under development. As provided in the Company's Application and supporting testimony in this Docket, the Company believes that the continued development of the Lee Nuclear Station is prudent and is needed to maintain the project as an option to serve customers' needs in the 2018 timeframe.

3. The Company is currently engaged in negotiations with a consortium known as Westinghouse Electric Corporation/Shaw Stone and Webster ("Westinghouse/Shaw") for a contract for the engineering, procurement and

construction of the Lee Nuclear Station. In connection with those negotiations, the Company and Westinghouse/Shaw are developing updated information concerning the estimated cost of the development and construction of the entire project, including not only Westinghouse/Shaw's scope but also other items, such as procurement of major components of the project (e.g., the turbines, reactors, etc.) and the Company's own direct costs. The Company may procure some of these components directly from equipment suppliers who are not involved in the negotiations between the Company and Westinghouse/Shaw and who have not been made privy to these project cost estimates.

4. Confidential information regarding the Company's cost estimates for the Lee Nuclear Station has been requested by legal counsel for Friends of the Earth, an organization which has intervened to oppose the Company's application in this docket. It is my understanding that counsel for Duke Energy Carolinas has contacted counsel for Friends of the Earth and attempted to resolve issues regarding the confidentiality of documents which have been requested. Those efforts have not been successful and the Company has filed a motion seeking an order to protect the confidentiality of the documents. I am submitting this affidavit to explain why this Commission should issue an order protecting the confidentiality of the documents.

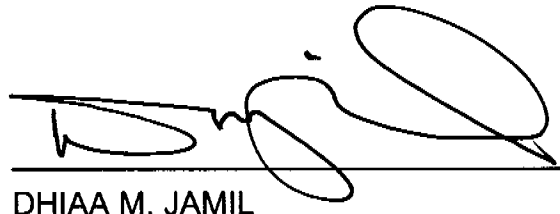
5. Using these confidential cost estimates and related documents (list attached as Exhibit A), an experienced equipment supplier – and all potential suppliers of such equipment with whom the Company may deal have the requisite experience—can in effect “reverse engineer” the data to estimate the Company's anticipated costs related to the procurement of its equipment. If these suppliers

have knowledge of the Company's estimated costs, then any bargaining position would be lost—all to the detriment of the Company's customers.

6. Allowing the public access to this cost data could, therefore, harm the Company's negotiating strategy and position with these potential suppliers as the Company enters into negotiations with them. Until commercial negotiations are sufficiently concluded, making public the cost estimates would only serve to hamper the Company's ability to negotiate the lowest cost for our customers.

7. The Company has taken considerable steps to protect the confidentiality of the documents listed on Exhibit A. Access to such documents is controlled within the Company and only those who have a business reason to have the documents are allowed to see them. Copies are limited and we take all reasonable steps to protect the secrecy of the documents.

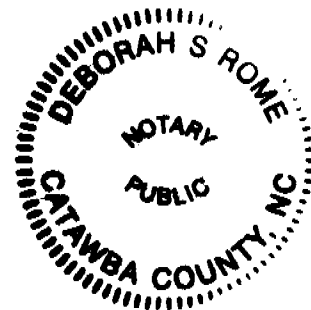
Dated this 4 day of April, 2008


DHIAA M. JAMIL

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 4 DAY OF APRIL, 2008.

Deborah S. Rome Deborah S. Rome
Notary Public for

My Commission Expires: December 19, 2009



**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2007-440-E**

In the Matter of)

CERTIFICATE OF SERVICE

Application of Duke Energy Carolinas, LLC)
for Approval of Decision to Incur Nuclear)
Generation Pre-Construction Costs For the)
Lee Nuclear Station in Cherokee County)

This is to certify that I, Leslie L. Allen, a legal assistant with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Motion for Protective Order** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Nanette S. Edwards, Esquire
C. Lessie Hammonds, Esquire
Office of Regulatory Staff
P.O. Box 11236
Columbia, SC 29211

Scott A. Elliott, Esquire
SC Energy Users Committee
Elliott & Elliott, PA
721 Olive Avenue
Columbia, SC 29205

Robert Guild, Esquire
Friends of the Earth
314 Pall Mall
Columbia, SC 29201

Dated at Columbia, South Carolina this 7th day of April, 2008.



Leslie L. Allen